©BNA's Law Reprints, Inc: U.S. Supreme Court Records and Briefs

Petition

81-688

Office-Supreme Court, U.S.
FILED
SEP 17 1981
ALEXANDER L. STEVAS

IN THE
SUPREME COURT
OF THE UNITED STATES

WILLIAM A. TALBERT, Petitioner

v.

CITY OF RICHMOND, et al., Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

Michael S. Shelton
COHEN, ABELOFF & STAPLES, P.C.
207 West Franklin Street
Richmond, Virginia 23220

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court's decision and opinion in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), permits the consideration of race by the City of Richmond in this instance?.....

2. Whether the City of Richmond is permitted to justify the consideration of race in a promotional decision when the city officials deny that race was considered, city personnel rules and regulations expressly prohibit the consideration of race and a prior consent decree to which the city was a party also expressly prohibits the consideration of race?.....

3. Whether the district court applied the proper legal standard in determining that the City of Richmond violated Talbert's constitutional right to equal protection?.....

TABLE OF CONTENTS

	Page
Statement of Questions Presented for Review	3
Opinions Below	1
Statement of Jurisdiction	2
Statement of the Case	4
Statement of Material Facts	6
Argument	17
Conclusion	24
Certificate	26
Appendix I: Judgment of the United States District Court for the Eastern District of Virginia, Richmond Division rendered in open court on January 23, 1980. (Transcript pp.151-167)	27
Appendix II: Opinion of the United States Court of Appeals for the Fourth Circuit delivered on May 1, 1981	51
Appendix III: Order of the United States Court of Appeals for the Fourth Circuit filed on June 19, 1981	79

TABLE OF CITATIONS

	Page
Fullilove v. Klutznick, ___ U.S. ___, 100 S.Ct. 2758 (1980).....	13,17, 22,23, 24,25
Regents of the University of California v. Bakke, 238 U.S. 265 (1978).....	3,13, 14,16, 17,18, 19,20, 21,22, 23,24, 25
Talbert v. City of Richmond, 648 F.2d 925 (4th Cir. 1981).....	2

IN THE
SUPREME COURT
OF THE UNITED STATES

WILLIAM A. TALBERT, Petitioner

v.

CITY OF RICHMOND, et al., Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

The petitioner, William A. Talbert, by counsel, respectfully petitions this Court for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fourth Circuit delivered on May 1, 1981.

OPINIONS BELOW

The judgment of the United States District Court for the Eastern District of Virginia, Richmond Division was rendered in open court on January 23, 1980.

It is printed and attached hereto as Appendix I. The opinion of the United States Court of Appeals for the Fourth Circuit was delivered on May 1, 1981. The official report of the opinion can be found at 648 F.2d 925 (4th Cir. 1981). A copy of the opinion is attached to the petition as Appendix II. An order denying the petitioner's petition for rehearing and suggestion for rehearing en banc was filed on June 19, 1981. It is not officially reported and is printed and attached as Appendix III.

STATEMENT OF JURISDICTION

The opinion sought to be reviewed was delivered on May 1, 1981. The petitioner timely filed a petition for rehearing and suggestion for rehearing en banc on May 15, 1981. The circuit court requested and the appellants filed a response to the petition. By order filed

on June 19, 1981, the circuit court denied the petition for rehearing and suggestion for rehearing en banc.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) to review the opinion of the circuit court by writ of certiorari.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court's decision and opinion in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), permits the consideration of race by the City of Richmond in this instance?

2. Whether the City of Richmond is permitted to justify the consideration of race in a promotional decision when the city officials deny that race was considered, city personnel rules and regulations expressly prohibit the consideration of race and a prior consent decree to which the city was a party also

expressly prohibits the consideration of race?

3. Whether the district court applied the proper legal standard in determining that the City of Richmond violated Talbert's constitutional right to equal protection?

STATEMENT OF THE CASE

Talbert filed a complaint in the United States District Court for the Eastern District of Virginia, Richmond Division on April 11, 1979. The complaint alleged violations of 42 U.S.C. §1983 and the Fourteenth Amendment. Jurisdiction was invoked pursuant to 42 U.S.C. 1343. Responsive pleadings were filed by the City of Richmond and the various officials who were named as defendants. The case was heard without a jury on January 23, 1980. The district court found Talbert had been the victim

of unlawful racial discrimination and entered judgment in favor of Talbert against the City of Richmond and Jack M. Fulton. Counsel for the parties were requested to confer as to damages, attorney's fees and injunctive relief. The district court rejected various post-trial motions filed on behalf of the city and Fulton and on March 12, 1980, entered an order granting to the plaintiff the relief stipulated between the parties.

The City of Richmond filed an appropriate notice of appeal and after the filing of briefs, oral argument was held before the circuit court on November 12, 1980. By opinion delivered on May 1, 1981, the circuit court reversed the decision of the district court and directed the entry of judgment in favor of the city and Fulton. Talbert filed a petition for rehearing and suggestion for re-

hearing en banc which were denied by the circuit court on June 16, 1981. On July 2, 1981, counsel for Talbert requested certification and transmission of the record in this case to this Court.

STATEMENT OF MATERIAL FACTS[1]

At the time the complaint was filed, William A. Talbert was a member of the Richmond Bureau of Police and held the rank of captain. Talbert is of the white race. At the time the complaint was filed, Laurel M. Miller was a member of

---

[1]Under the pre-trial procedures utilized by the district court, the parties stipulated certain material facts and exhibits. The exhibits were set forth in order in Pre-Trial Conference, Section A, entered on January 14, 1980. The stipulated facts were set forth in number paragraphs in order in Pre-Trial Conference, Section C. The exhibits will be referred to by their exhibit numbers. The stipulated facts will be referred to as "Pre-Trial Order, paragraph C-___". The transcript of the trial proceedings on January 23, 1980 will be referred to as "Transcript at ___".

the Richmond Bureau of Police and held the rank of major, having been promoted on September 2, 1978. Jack M. Fulton is the Richmond Director of Public Safety. As such, he is the appointing authority for all promotions within the Bureau of Police including the promotions to the rank of police major on September 2, 1978.

In May of 1978, the Department of Personnel of the City of Richmond issued a notice to applicants for promotion to police major. The notice stated that applicants would be selected by use of an assessment center and would be ranked according to their total assessment center scores. Eight captains, including Talbert and Miller, applied for promotion, took the assessment center tests and were subsequently ranked according to their respective scores. The assessment center testing procedure cost the City of Rich-

mond $8,964.00 and required each applicant to spend 2 days completing the procedure. Pre-trial Order, paragraphs 8, 9, 11. Because there existed three vacancies for police major, up to eight individuals were to be certified for the vacancies. Pre-Trial Order, paragraph 7. As a result, all eight candidates were placed on the certification list.

As a result of the assessment center testing, Captain Talbert was ranked third with a score of 39.5. Captain Miller was ranked eighth and last with a score of 34.0. Pre-trial Order, paragraph 12. Dr. Robert J. Filer, the city's retained expert, testified at trial that the purpose of the assessment center was to provide differentiation among candidates and that in those circumstances where objective criteria were equal, a point difference of four to six points would be con-

sidered significant. Transcript at 23-24.

Prior to receiving the results of the assessment center, Frank S. Duling, Chief of the Bureau of Police, considered each of the eight candidates to be equally qualified for promotion to the rank of major. Transcript at 67. Subsequent to the assessment center tests, Colonel Duling reviewed the personnel folders of all candidates and interviewed each candidate. Transcript at 70. Duling testified at trial that, based upon the objective criteria regarding the various candidates, all were considered equal. Transcript at 77.

On August 22, 1978, Colonel Duling sent recommendations to Jack M. Fulton for the three vacancies. Duling's recommendations followed the order of the assessment center ranking with one ex-

ception; Captain Miller was recommended as third choice for the promotion even though he ranked eighth and last by reference to assessment center scores. The stipulated evidence revealed that on prior promotions to the rank of police major, the ranking of the assessment center process had been prior to September 2, 1978 generally followed. On only two occasions prior to September 2, 1978 had the ranking not been followed per se with respect to promotions to police major and these occasions involved differences in scores of only .75 and .50 points respectively. Pre-trial Order, paragraph 23, 24, 25. The point difference between Talbert and Miller totaled 5.5 points.

In the written recommendation sent by Duling to Fulton on August 22, 1978,

the following reference was included regarding Captain Miller:

> "For the record, I believe this additional comment is necessary.
>
> Captain Miller is the first black who has ever been in contention for promotion to Major. He has reached this position on his own merit. In a City with a population which is approximately 50% black, I feel it would be to the City's advantage to have a man of his caliber and reputation in a top level policy making position.
>
> I do not feel that the point difference between positions 3-4-5-6 and 8 is so great that we should side step this opportunity to promote a deserving individual and at the same time to comply with the spirit and intent of the City's Affirmative Action Plan."

Fulton and Duling met on August 31, 1978 to discuss the recommendations including this reference to race.

Fulton admitted he was aware of the city's policy of promoting on the basis of merit without any regard to race.

Transcript at 41-42. This policy was incorporated in the city's personnel rules, the city's equal employment opportunity plan and a consent decree to which the city was a party.

At the trial of this matter, both Duling and Fulton tried to convince the district court that the recommendation and decision to promote Miller to major was based entirely upon merit and was not on the basis of race. Transcript at 47. Both denied that Miller's promotion was based in whole or in part upon race. The district court, however, found from the evidence that both Talbert and Miller were found to be equally qualified for promotion and that Miller's race was the sole basis for the promotion of Miller instead of Talbert. This finding of fact was not found to be clearly erroneous by the circuit court.

SUMMARY OF ARGUMENT

The opinion rendered by the circuit court in this case on May 1, 1981 overlooked material facts affecting the petitioner's claims and failed to address certain claims contained in the petitioner's original complaint. In addition, the opinion is in conflict with the principles set forth in the opinions of this Court as found in Regents of the University of California v. Bakke, 438 U.S. 265 (1978) and Fullilove v. Klutznick, ___ U.S. ___, 100 S.Ct. 2758 (1980).

In its opinion, the circuit court sanctioned the city's consideration of race in making a promotional decision while overlooking the fact that the respondents in their responsive pleadings, in the testimony before the district court, in their oral arguments before the district court and in their written

arguments before the circuit court denied that race was considered in promoting Captain Miller to the rank of major. See, e.g., Brief for Appellants at 11-12. In fact, in both the written and oral arguments before the circuit court, the respondents admitted that they were prohibited by the city's personnel rules and a prior consent decree from considering race in the promotional process. See, e.g., Plaintiff's Exhibit No. 1.[2] While Regents of the University of California v. Bakke, 438 U.S. 265 (1978), might sanction the consideration of race, possibly even in the absence of an affirmative action program, it does not and can-

---

[2]The Equal Employment Opportunity Plan stated: "Appointments, tenure and promotions shall be based upon merit and fitness without regard to sex, race, religion, national origin, political affiliation or other non-merit job related factors.

not sanction the consideration of race when that consideration is denied. This particular factor was not addressed, or even mentioned by the circuit court in its opinion of May 1, 1981.

In addition, the circuit court did not address Talbert's claims that the consideration of race in promoting Captain Miller to major not only violated the equal protection clause of the fourteenth amendment but violated the city's own personnel rules and the city's acknowledged obligations under the 1975 consent decree. The respondents admitted that each of these sources required promotional decisions to be made solely on the basis of merit without any regard to race. A violation of either of these obligations should have entitled Talbert to relief under Count II and/or Count IV of the complaint. No consideration to

these claims was evident from the opinion of May 1, 1981. The matter was not even remanded by the circuit court to the district court for further consideration of these claims.

Finally, to the extent Bakke is applicable, Bakke sanctions the limited use of racial criteria but only "to redress wrongs worked by adjudicated instances of racial discrimination" and only provided such use is the least harmful alternative. The district court, following this rationale, concluded that unless the consideration of race was admitted and conceded, it could not be said to serve such a governmental function. Transcript at 157-158. In addition, the district court was quick to point out that there had been no prior adjudication of racial discrimination. See Transcript at 81-82. The opinion of May

1, 1981 fails to address this departure from Bakke. The record in this case contains less evidence than that found in Bakke upon which the consideration of race could be sanctioned.

The circuit court's opinion relies almost exclusively upon the analysis employed by Mr. Justice Powell in Bakke. It does not address, or even mention, the further clarification of this analysis as found in Fullilove v. Klutznick, ___ U.S. ___, 100 S.Ct. 2758 (1980).

ARGUMENT

In his complaint, Talbert claimed that the city and its officials denied him a promotion on September 2, 1978 on the basis of his race. He contended that the consideration of race in this instance was illegal because it violated the equal protection clause of the fourteenth amendment (Count I), it violated the city's

own stated personnel rules and policies and was thus arbitrary and capricious (Count II) and that it violated the obligations of a prior consent decree entered in 1975 (Count IV). The respondents denied that race was considered in the promotional decision.

The district court found that race was in fact considered. This finding was not reversed by the circuit court. The district court found that Bakke was inapplicable to sanction this consideration of race not because of the absence of an affirmative action program but because of the respondents' continual denial that race was utilized. See Transcript at 157-158. The district court found Bakke inapplicable unless the respondents conceded a deliberate policy of racial consideration. The circuit court overlooked this continual denial by the respondents -

a denial that continued in the circuit court - and failed to address the district court's analysis of the legal effect of this denial.

The circuit court's opinion stated that the district court did not evaluate the relative merits of Miller and Talbert. This conclusion overlooks the uncontroverted testimony of Chief Duling that both candidates were considered by him to be equally qualified. Transcript at 145. It was from this fact that the district court concluded that race was the determining factor in Miller's selection - a finding of fact that was not rejected by the circuit court in its opinion of May 1, 1981 as being clearly erroneous.

Mr. Justice Powell's analysis as found in Bakke has been interpreted to permit the consideration of race if employed to redress wrongs worked by ad-

judicated instances of past racial discrimination. This Court noted, however, that such consideration had never been approved or permitted "in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations". 438 U.S. at 307. The record in this case is completely devoid of such findings. In fact, as noted by the circuit court, the respondents denied that such violations occurred. Mr. Justice Powell, in Bakke, clearly indicated that the use of race to remedy the effects of generalized societal discrimination was improper. 438 U.S. at 310. Nowhere in the Bakke opinion is there support for the respondents' position that the consideration of race, which they deny took place, is sanctioned by generalized objectives of increasing the number of high-ranking black police of-

ficers at the expense of equally qualified whites. Mr. Justice Powell states exactly the opposite. 438 U.S. 308-09.

What Mr. Justice Powell did state in Bakke was that racial discrimination against whites was to be considered suspect even if its purpose was characterized as benign. The protections of the equal protection clause apply equally to whites as they would to blacks. 438 U.S. at 294-95. The district court applied the same rationale. To justify a consideration of race which has the effect of helping one individual while harming another, the respondents must show that their purpose and intent was constitutionally permissable and substantial and that their use of the classification was necessary to the accomplishment of that purpose.

As interpreted by the district court, this burden required that the respondents show a purposeful and intentional consideration of race to further a specific governmental interest. The record in this case is completely void of any evidence that would show a deliberate effort to achieve "diversity" in the city police department, or any evidence to show that such "diversity" is a legitimate governmental interest, or any evidence to show that the consideration of race would achieve such "diversity". What the record did contain were consistent denials by the respondents that race was ever considered in this instance. When such consideration is found to exist, it cannot thereafter be justified.

Even in Bakke, race was not to be applied as the sole determining factor. See Fullilove, supra, 100 S.Ct. at 2785.

Yet the district court found as a matter of fact - a finding not found by the circuit court to be clearly erroneous - that race was the determining factor in Captain Miller's promotion.

The scrutiny employed by Mr. Justice Powell in Bakke has been further defined by a concurring opinion in Fullilove v. Klutznick, ___ U.S. ___ 100 S.Ct. 2758 (1980). The opinion noted that in order to utilize the consideration of race "the governmental body must make findings that demonstrate the existence of illegal discrimination" in the past. 100 S.Ct. at 2785. Such findings obviously must take place before consideration of race can take place. Such findings, by implication, cannot be used "after the fact" to justify events that have already taken place. With this analysis, the district court in this instance was in accord.

Transcript at 157. In addition, the governmental body must demonstrate that the consideration of race is narrowly drawn and incorporates sufficient safeguards to prevent abuse. As has been noted previously in this petition, the record in this case is void of any such evidence or findings.

CONCLUSION

Nowhere in the circuit court's opinion of May 1, 1981 is reference made to the fact that the respondents denied that race was a consideration in the promotion of Captain Miller. This fact, when inserted into the analysis found in Bakke and Fullilove, requires that the consideration of race in this instance not receive judicial sanction.

The circuit court's opinion affirmed the district court's finding of fact that in fact race was considered. This is in

direct violation of the obligations admitted by the respondents and should entitle the petitioner to relief under his complaint.

Finally, the specific requirements to be met by a governmental body to justify the consideration of race as enunciated in Bakke and Fullilove were not addressed by the circuit court. In fact, the record in this case does not provide sufficient evidence to allow the respondents to meet these requirements.

For these reasons, and the arguments contained herein, the petitioner respectfully requests that a writ of certiorari issue to further review the opinion of the Circuit Court of Appeals for the Fourth Circuit delivered on May 1, 1981.

WILLIAM A. TALBERT

By _____
Counsel

Michael S. Shelton
COHEN, ABELOFF & STAPLES, P.C.
207 West Franklin Street
Richmond, Virginia 23220

CERTIFICATE

I hereby certify that I have this 8th day of October, 1981, hand-delivered a true copy of the Petition for Writ of Certiorari to James R. Saul, Esquire, Assistant City Attorney, 300 City Hall, Richmond, Virginia 23219, counsel of record for the respondents.

Michael S. Shelton

APPENDIX I: JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, RICHMOND DIVISION RENDERED IN OPEN COURT ON JANUARY 23, 1980. (TRANSCRIPT PP. 151-167)

THE COURT: This is the most open and obvious case of race discrimination that I have tried in better than five years. The facts are that Captain Talbert and Captain Miller were of substantially similar background in the police force. Their records were not discernibly different when viewed by the Chief. And their spread sheet was not significantly different in any way.

The Chief was unable to determine from an examation of their personnel files and the spread sheet any reason to prefer one over the other.

He received the assessment center scores, and he noted the substantial disparity between the score of Captain Talbert and the score of Captain Miller. He

recognized it as being a great disparity. He had an assessment score difference of some 5.5 points, which under the testimony of Dr. Filer is a significant difference, a difference which predicts that the one with the highest score will perform significantly better than the one with the lower score.

There is evidence that Dr. Filer communicated to the Defendant City of Richmond through its appropriate officers the significance of a difference of that magnitude. Unaccountably, there is no evidence that those who were hired to use this extremely expensive tool the City has bought were ever told how to use it. They were never told what the scores meant; they were never told what a significant difference in scores was. I have to accept that, though as I say, it is amazing to me that the City would pay

that much money to buy this assessment center predicting tool and not tell the people that have to use it how it ought to be used. That's amazing. But there is credible evidence that that is a fact, and I'll accept it as a fact.

Nevertheless, the persons who were required to use this tool, in this case Col. Duling and Mr. Fulton, indicated to the Court from their demeanor, their testimony, their record, their background, that they are people of at least normal intelligence, and I frankly accept that they are substantially above normal intelligence. They would not have achieved the positions that they have without that. And they have acknowledged that they know that a high score is better than a low score, and they have acknowledged that they know that a difference in scores of a little bit is probably of very little

significance, but a difference in scores of a substantial amount is probably a substantial difference in the predictability of the test results as to how the person will perform.

And it's clear from the memorandum, Plaintiff's Exhibit Three, that both Col. Duling and Mr. Fulton were concerned about the substantial difference between the scores and understood the significance. So whether or not they were told by the responsible officers how to use the test scores, what their meaning was, they understood it at least as well as a layman can understand it, and that is sufficient for them to understand. And the evidence pointed out by Col. Duling when he said, "I do not feel the point difference between positions three, four, five, six, and eight is so great that we should sidestep this opportunity to pro-

mote"--and I am going to substitute now the word that is significant--a black man "to a position of Major." And so he understood that the score differential was significant, but he was not going to let that stand in his way of making a promotion of a black man from a Captain to Major.

Now, his reasons for doing that are in most respects laudatory. His reason for doing it is because he thought it was best for the police force; he thought it was best for the City; he thought that it would help the City in its relations with the people that the police force is required to maintain order among, and to enforce the law. He thought it would be good for the spirit and morale of the citizens. I'm certain all of those things entered into Col. Duling's and Mr. Fulton's determination to make this promo-

tion on the basis of race.

The philosophy of making determinations in hiring, and promotion, and discipline on the basis of race is a philosophy which held sway in this area of the county for quite a long time. But effective with the Supreme Court decisions in modern times this philosophy was determined to be wrong, and the law has been clear in the United States for at least 15 years that determinations in employment situations which result in discrimination because of race are illegal. Whether or not they're good or bad, they're illegal. Whether or not one is motivated by benign or malign purposes, they're illegal.

Now, I suggest that all of the good things that Col. Duling and Mr. Fulton foresee in promoting on the basis of race may not come to fruition, and they may be

reaping a harvest which will be detrimenta; to all of thr things that they think they are promoting; resentment among persons, particularly black persons, who resent the implication that they can't be promoted on merit, but have to be promoted on race. I would think that that would be a resentmentthat would be bad for morale, not good for morale. The resentment on the part of the citizens that believe that decisions are made on the basis of race, in this case to help a black, and they say, "If they'll do it for a black, they'll do it for a white." They will believe the Department is not made up of persons promoted on merit, but, instead, the "profile" is based upon what race is needed to make things look good right now.

I suggest that it is a path which we went down before, wrongly, and if we

merely turn around and go back down the other side of the hill, following the same path, the results will be equally as sad.

The thing to do, as I understand the law, is to stay on the high ground. Make your decisions solely on the basis of merit.

Mr. Shelton is quite right. The assessment center in this particular case, following the requirements of 9.09, if I'm citing it correctly from the Charter, would be a mere farce. The expenditure of the citizen's money for that purpose was following a form and disregarding substance. It had nothing to do with the substance of the matter. There were only eight candidates. Eight would be certified by the assessment center. It simply wouldn't make any difference what ranking there might be among the eight persons if

all eight were to be thrown into the sack and simply judged on other matters with no regard to their ranking from the assessment center.

As a matter of fact, it's clear that Col. Duling ranked them all from the assessment center scores. He ranked them right down the line, just as the assessment center ranked them; one, two, eight, three, four, five, six, and seven. He departed from that rank for one purpose and one purpose only, and that was for consideration of race. He took the man who was number eight, or seven, if you want to be technically correct since I think two people were tied for sixth, and put him up to number three. He did that because he thought it was a good idea--a good idea to discriminate on account of race. Congress has determined that that's not a good idea.

Now, Mr. Saul has mentioned once or twice the Bakke decision. I perhaps am with the majority of judges and lawyers in having to profess that I'm not certain what the law is with respect to race discrimination after having studied and read Bakke and Weber and commentaries on Bakke and Weber by other people far more learned than I am.

But I do gather this, that while at least in the graduate field of study, race, among other things, may be a factor to be considered in determining who is to be admitted to the graduate school, I don't believe there's anything in Bakke that says that race can be the determining factor. And in this case, the case that I have before me, it is the sole factor, the sole reason that Captain Miller was promoted over Captain Talbert. No one, given ample opportunity in dis-

covery and ample opportunity in this courtroom to point out any reason for promoting Mr. Miller over Mr. Talbert, could come up with a reason other than race.

In any event, this is not a Bakke case nor a Weber case. You can't back into Bakke. If you have a deliberate policy of racial discrimination as in Bakke and Weber you must, at the least, prove what your policy is, prove why you adopted it, and prove that you have complied with it. Defendants here proved none of these. To the contrary, they swore they had no policy of racial discrimination and defend the non-selection of Plaintiff as being merit based. Under such circumstances, neither Bakke nor Weber can give aid and comfort to the employer.

Col. Duling testified that when he considered the spread sheet, when he considered their personnel file, he couldn't make a decision between them, that he had not been able to discern a difference. Well, there's nothing that he learned after that that he testified to that flipped the difference. There was nothing that he learned, according to the evidence, that suddenly brought Captain Miller forward as being the better.

He said that, as the evidence here shows, that he's known them all for quite a period of time, and despite all this knowledge he had of them for a long period of time he couldn't discern a difference between them; therefore, it must have been something that happened afterwards that made a difference if it is to be something other than race, but he testified to nothing that happened either

before or afterwards that separated Captain Miller from the other people who were certified.

Now, Mr. fulton testified that all of the things that were mentioned in Col. Duling's memorandum, Plaintiff's Exhibit Three, were discussed between him and Col. Duling, every one of them, and all that is contained on page three of the exhibit about Captain Miller is race. That's the only thing that the recommendation talked about--race. Insofar as other factors were mentioned, a comparison of the comments on Talbert to Miller clearly favored Talbert.

Mr. Fulton says that not only were those race factors discussed, but that they were considered that they were factors in a determination that he had to make as to who to promote.

I think that it's obvious that if you were to take out the question of race and leave the question solely on the basis of other matters that Col. Duling, himself, when he described the people in Plaintiff's Exhibit Three, he described Captain Talbert better, in much more glowing terms, far, far more complimentary, with a substantially greater discription of him as being a proper person for promotion. I must contrast that with his discussion of Captain Miller where he must relegate his discussions to such things as honesty, fairness and impartiality. And I am not in the least denigrating those qualities. I think that they were absolutely essential qualities, not only for police officers, but even for a good citizen, to be honest, fair, and impartial. But the Colonel admitted that even the foot soldier out on the

beat is supposed to be honest, and fair, and impartial, and I think, frankly, that including such comments as that indicates a paucity of comments of the type that he used when he referred to Captain Talbert as a capable and efficient officer, a take-charge type, one who can be relied upon to get the job done, et cetera.

I recognize the dilemma that Mr. Fulton and Col. Duling are in. They haven't testified to it here, but I assume that they feel beset on all sides. If they promote a white man, a black man is going to sue them. If they promote a black man, a white man is going to sue them. If they consider race, they're going to be hauled down here for a race discrimination case. If they don't consider race, they're going to be hauled around to some law enforcement assistance administration, or HEW, or somebody else

who is going to get after them about their "profile", or their "goal", or whatever name is stylish at the moment.

So they say, "What on Earth are we going to do? All we really want to do is run a good Police Department."

And my suggestion to them is that they stick to that and just leave race out of their promotions. I believe that's what Congress intended that they do. And they didn't do that in this case.

The Judgment will enter for the Plaintiff against the Defendants.

As for the Defendant City, it is clear that the Defendants were acting throughout in carrying out what they conceived to be a policy or goal of the City to improve the Police Department through race preference in promotion. Whether or not that is a good policy, it is an illegal policy.

Now, do Counsel believe that given the stipulations and the evidence before the Court which is uncontradicted that with respect to damages that they would be able to formulate an appropriate injunctive and damages relief in this case?

MR. SAUL: Your Honor, I think the only evidence of damages other than speculative testimony was that with reference to --

THE COURT: Did you understand my question, Mr. Saul?

MR. SAUL: I think, Your Honor, if Mr. Shelton and I are thinking along the same lines with reference to it --

THE COURT: Your answer to my question is yes, you think you could work out an appropriate settlement?

MR. SAUL: Yes, sir, I think so.

THE COURT: Do you also agree with that, Mr. Shelton?

MR. SHELTON: Yes, sir, I do.

THE COURT: I would like y'all to go about that with dispatch so that the matter can be disposed of.

Now, I haven't, frankly, haven't looked at any of my notes here, but are there certain findings of fact which either of you believe that I should find consistent with my other rulings that I didn't find? I'll be happy to hear from you.

Mr. Saul.

MR. SAUL: Your Honor, I think, if I may, the Court has indicated that from what I have understood the Court to say it finds that Col. Duling and Mr. Fulton did in fact consider race.

THE COURT: Was there any confusion about that?

MR. SAUL: I'm just trying to say --

THE COURT: I thought that I said

that at the very beginning.

MR. SAUL: Apparently, the Court is rejecting the Defendants' arguments based on Bakke and the Detroit Police Officers' Association.

THE COURT: As a matter of fact, you made no such argument, but --

MR. SAUL: In my proposed findings of fact and conclusions of law, I did, Your Honor.

THE COURT: Yes. I thought I dealt with that. Didn't I deal with that in my -- Didn't I deal with it, Mr. Saul?

MR. SAUL: I understand the Court is rejecting that idea.

THE COURT: Do you understand? Was there any question about it?

MR. SAUL: I understand the Court to reject that idea, yes, sir.

THE COURT: Well, I thought it did so clearly. It's disappointing to me to

learn that I didn't. Do you have any findings of fact that you asked me to find that are consistent with the Court's findings in this case? That's what my question was.

MR. SAUL: Well not consistent with the Court's findings, Your Honor. I may when I have this typed up move the Court to --

THE COURT: Is the answer no, Mr. Saul? Is the answer no?

MR. SAUL: No.

THE COURT: Mr. Shelton, have I omitted some finding?

MR. SHELTON: Only one, Judge, in that I was careful to make notes both Mr. Duling and Mr. Fulton testified to the effect that they were familiar with the equal opportunity plans of both the City of Richmond and the Bureau and the obligations of the consent decree and that

they were consciously aware that the consideration of race was improper. This may or may not --

THE COURT: I have a note to that effect, that they were both conscious. "Fulton: 'I know race cannot be considered'", end quote. And I do so find.

MR. SHELTON: Thank you.

MR. SAUL: Your Honor, there are a number of Defendants in this case. I would ask the Court to indicate whom the judgment will be against. I have heard no testimony that would indicate discrimination on the part of Mr. Thornton. He knew nothing about who was being promoted prior to the --

THE COURT: Mr. Shelton.

MR. SHELTON: I would concede that Mr. Thornton and Mr. Deese --

THE COURT: The Court finds for Mr. Thornton.

MR. SHELTON: And Mr. Deese.

THE COURT: Mr. Deese.

MR. SHELTON: And Miss Carter.

THE COURT: And Miss Carter.

MR. SHELTON: My reason, if I may, Your Honor, my reason for continuing to keep them in is that I believe that they may be necessary for whatever injunctive relief we wanted to do regards seniority, regarding actual, purposeful discrimination.

THE COURT: Insofar as damage is found, the Court finds for those Defendants, but they are retained as parties Defendant for any injunctive relief that may be appropriate.

MR. SAUL: Yes, sir. The City of Richmond, Your Honor, what is the Court's judgment as far as --

THE COURT: The City of Richmond is a liable Defendant. The City of Richmond

only operates through its servants.

MR. SAUL: Perhaps I will ask the Court -- The Court's apparently finding that the Defendants Mr. Fulton and Col. Duling discriminated agsinst Major Miller because they failed to --

THE COURT: Captain Talbert?

MR. SAUL: I'm sorry, Captain Talbert, because they failed to consider the assessment center results, the performance on the assessment center procedure, and those examinations. Now, is the Court also finding that there was some duty under City policy to consider those procedures or those test scores?

THE COURT: Well, I really thought that I explained my opinion, but apparently I didn't. I'll simply ask you to refer to the transcript of my opinion so that you can find out what I was ruling. With respect to City policy, it is clear

that the reason that they made this promotion was to promote what they considered was the interest of the City in having a -- if I may quote Col. Duling, "I think it is important to the Bureau that I have a top ranking officer who is black."

They were carrying out a City policy to have a top ranking officer who was black.

MR. SAUL: All right, sir. Your Honor, thank you.

THE COURT: All right.

(WHEREUPON, the proceedings were adjourned at 5:04 p.m.)

APPENDIX II: OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DELIVERED ON MAY 1, 1981

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1273

William A. Talbert, Appellee,

-v-

City of Richmond; Jack M. Fulton, individually and in his official capacity as Director of Public Safety of the City of Richmond, Appellants,

and

Manuel Deese, in his official capacity as City Manager of the City of Richmond; Theodore E. Thornton, individually as Former Director of Personnel of the City of Richmond; Beryl Carter, in her official capacity as Acting Director of the Personnel of the City of Richmond, Defendants.

Appeal from the United States District Court for the Eastern District of Vir-

ginia, at Richmond. D. Dortch Warriner, Judge.

Argued November 12, 1980

Decided May 1, 1980

Before BUTZNER, Circuit Judge, FIELD, Senior Circuit Judge, and HALL, Circuit Judge.

James R. Saul, Assistant City Attorney (Conard B. Mattox, Jr., City Attorney on brief) for appellants; Michael S. Shelton (Cohen, Abeloff & Staples, P.C. on brief) for appellee.

BUTZNER, Circuit Judge:

The City of Richmond, Virginia, and Jack M. Fulton, its Director of Public Safety, appeal from a judgment of the district court that awarded damages and injunctive relief to William A. Talbert, a white police officer, on his complaint that the city and its officials denied him promotion on the basis of his race. Talbert predicates his claim on 42 U.S.C. §§1983, 1985(3), 1986, and 1988, the fourteenth amendement, and appropriate jurisdictional statutes. He does not rely on Title VII of the Civil Rights Act of 1964, as amended. We reverse because we believe the district court did not apply a proper legal standard in determining whether the city violated the equal protection clause of the fourteenth amendment.

I

Talbert claims that the city denied him equal protection of the law when it failed in 1978 to promote him from the rank of captain to major. The city had posted a notice announcing three vacancies in this rank. The city charter establishes a "rule of five" as the initial procedure for making promotions. The appointing authority, in this case the Director of Public Safety, is required to consider for promotion a number of candidates equal to the number of vacancies plus five. Therefore, the eligibility list for the three vacancies contained eight names. Candidates were certified to the eligibility list as a result of testing conducted at the city's personnel assessment center.

When the Chief received the certified eligibility list from the personnel

department, the eight candidates were listed in the order of their performance at the assessment center. Talbert was listed number three, with an assessment center score of 39.5. In a letter to the Director, the Chief recommended for promotion the first two candidates on the list. He then skipped over Talbert and several other white candidates and recommended candidate number eight, Laurel M. Miller, a black police captain whose test score was 34.0.

The letter commented on each candidate. Regarding Talbert the letter stated:

> A very capable and efficient officer. A take-charge type individual who can be relied upon to get the job done especially in the field. There is no doubt in my mind that he could function effectively as a Police Major and there would be no hesitancy in recommending his promotion if there is a future vacancy.

Regarding Miller the Chief wrote:

> A very steady, easy going individual who performs his assignments without fanfare. He has established a reputation for honesty, fairness and impartiality. His permanent assignment as Captain is Deputy-Inspector, but since June 4, [1977], he has been Acting Major-Inspector of Police. If you approve his promotion, it is my intention to make this his permanent assignment. For the record, I believe that this additional comment is necessary.
>
> Captain Miller is the first Black who has ever been in contention for promotion to Major. He has reached this plateau on his own merit. In a City with a population which is approximately 50% Black, I feel it would be to the City's advantage to have a man of his caliber and reputation in a top level policy making position.
>
> I do not feel that the point difference between positions 3-4-5-6 and 8 is so great that we should side step this opportunity to promote a deserving individual and at the same time to comply with the spirit and

intent of the City's Affirmative Action Plan.[1]

The Director accepted the Chief's recommendation and promoted Miller.

Talbert claims that in view of his superior test score, the officials' consideration of Miller's race establishes that the promotion was made unconstitutionally. The district court ruled in favor of Talbert. It found: Miller and Talbert had substantially similar backgrounds and records in the police department; the Chief's description of Talbert was "much more glowing" than his description of Miller; there was a 5.5 difference

---

[1] Two candidates were listed at the number six spot on the eligibility list since they had received identical scores from the personnel assessment center. Therefore no candidate was listed as number seven. Also, the Chief testified that in referring to the "City's Affirmative Action Plan" he meant the "City's Equal Opportunity Plan;" the city had no affirmative action plan.

in the candidates' test scores; this difference was predictive of better performance by Talbert; and although this predictive function of the test scores was never explained to either the Chief or the Director, they both recognized that a high score was better than a lower score.

The court did not evaluate the relative merits of Miller and Talbert, and it made no finding that one was better qualified than the other. Nor did it discuss the significance the Chief and the Director placed on the fact that Miller had been discharging the duties of a major in his capacity as Acting Inspector. Instead, the court emphasized the difference between Miller's and Talbert's assessment center scores. Referring to this difference, it drew the inference that the Chief's sole reason for recommending Miller was his race. With respect to this

reason, the court found:

> Now, his reasons for doing that are in most respects laudatory. His reason for doing it is because he thought it was best for the police force; he thought it was best for the City; he thought that it would help the City in its relations with the people that the police force is required to maintain order among, and to enforce the law. He thought it would be good for the spirit and morale of the citizens. I'm certain all of those things entered into [the Chief's] and [the Director's] determination to make this promotion on the basis of race.

The district court ruled that consideration of Miller's race was impermissible. It held that the city and its officers had violated Talbert's constitutional right to be free of discrimination on the basis of race, and it awarded him damages, injunctive relief, costs, and attorney's fees.

II

The city urges that it should pre-

vail because its action was consistent with the principles of Regents of the University of California v. Bakke, 438 U.S. 265 (1978). Miller's race, it argues, was simply a plus factor which could be considered along with his undisputed qualifications. Talbert contends that Bakke is inapposite because the city had no affirmative action program, and it never conceded past discrimination. The district court agreed with Talbert. It concluded that in the absence of an affirmative action program, Bakke prohibited any consideration of race.

Bakke dealt with a state school's special admissions program described in these terms: "To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 [minority] special admissions seats, white applicants could compete only for 84 seats

in the entering class, rather than the 100 open to minority applicants." 438 U.S. at 289. For various reasons a majority of the Court coalesced to hold that the admissions program was unlawful, that a white applicant barred by operation of the program was entitled to admission, but that it was error to enjoin the school from according any consideration of race in its admission program. 438 U.S. at 271-72 and 320.

Here, unlike Bakke, the city had no affirmative action program that set quotas or numerical goals for the promotion of minority police officers. Unlike Bakke there was no vacancies allotted exclusively to black officers from which white candidates for appointment were barred. Black and white officers completed for the same vacancies. Also, unlike Bakke, there is no suggestion that the city of-

ficials were motivated in making appointments by a desire to rectify past discrimination. Indeed, the city does not concede that it ever discriminated against its black employees.

Bakke, though not dispositive, is instructive. A majority of the Court, for different reasons, held that even if a state institution is not under an authoritative mandate to operate according to a formal affirmative action program, it is not absolutely barred from giving any consideration to race. 438 U.S. at 320 and 326. Justice Powell found justification for the Court's decision on this point in a state school's interest in obtaining a diverse student body. 438 U.S. at 311-15. Justice Brennan, Justice White, Justice Marshall, and Justice Blackmun justified the decision by the school's interest in rectifying past dis-

crimination. 438 U.S. at 362-69.

The city claims that it took race into account to advance the operational needs of the police department by achieving diversity among the officers ranked as major. It viewed such diversity as important to effective law enforcement in a city whose population was approximately 50% black. The city does not claim that it promoted Miller as a remedy for past discrimination in the department. Accordingly, we will follow Justice Powell's analysis in this case, because the city's claim that diversity is beneficial to operation of the department is akin to the claim accepted by Justice Powell in Bakke that a school has a legitimate interest in obtaining a diverse student population.

Justice Powell explained in Bakke that there is no facial intent to discriminate "in an admissions program where race

or ethnic background is simply one element--to be weighed fairly against other elements--in the selection process." 438 U.S. at 318. Whether such an individualized consideration of race would pass constitutional muster, Justice Powell suggests, should be determined by application of the principles expounded in Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977), Washington v. Davis, 426 U.S. 229 (1976), and Swainv. Alabama, 380 U.S. 202 (1965). 438 U.S. at 318-319. These cases prescribe criteria for determining whether a state's asserted reason for its action is a cloak for individual discrimination that violates the equal protection clause. 438 U.S. at 318-319. Accordingly, we will apply the principles of these cases to the facts disclosed by this record.

III

Washington v. Davis establishes that Talbert must prove that the city officials acted with a racially discriminatory intent or purpose when they promoted a black officer instead of him. This appointment obviously had an adverse impact on Talbert. But the impact of the officials' act, though relevant, is not sufficient to establish a violation of the fourteenth amendment. 426 U.S. at 239. In Arlington Heights the Court reiterated this cardinal principle: "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." 429 U.S. at 265.

Arlington Heights prescribes the following criteria for "determining whether invidious discriminatory purpose was a motivating factor" for the government's act: first, the impact of the act--that

is, whether it burdens one race more than another; second, the historical background of the challenged decision; third, the degree to which the action departs from either normal procedural sequence or normal substantive criteria; and, finally, the contemporaneous statements of those making the decisions. 429 U.S. at 266-68. This summary, though not exhaustive, identifies the "subjects of proper inquiry in determining whether racially discriminatory intent existed." 429 U.S. at 268.

In this case the appointment of a single black major results in no disproportionate impact on the white race. Along with Miller, two white officers were appointed. Subsequently, only white officers, including Talbert, have been promoted to the rank of major. Undoubtedly, the decision to take Miller's race into account had an adverse impact on

Talbert. But "impact alone is not determinative, and the Court must look to other evidence." 429 U.S. at 266.

The record discloses the historical background of the decision to appoint the first black officer to a high position in the police department. The Chief acknowledged that there was a time, within his service in the department, when it was considered important for the city "that there be no black police officers." This case was tried in the wake of another recent suit entitled Richmond Black Police Officers' Ass'n v. City of Richmond, 74-0267-R (E.D. Va., July 3, 1975), which was terminated by a consent decree reciting in part:

> The City of Richmond also denies that it has engaged in such racially discriminatory acts or practices, or pattern or practice, relating to employees of the Richmond Bureau of Police since the effective

> date of the 1972 Amendments to 42 U.S.C. §2000e et seq. But while denying liability to the named plaintiffs and the plaintiff class, the defendants realize that certain past practices within the Bureau may have given rise to an inference of discrimination against black persons. The individual defendants and the City have made good faith efforts to rectify and prevent racial discrimination in employment in the Richmond Bureau of Police and since June 11, 1974, the percentage of black employees has substantially increased. The defendants state that for the purpose of avoiding any further inference of discrimination, the City of Richmond has heretofore taken certain steps to eliminate policies, practices and procedures which were possibly discriminatory or potentially discriminatory against black persons.

The decree provided that the city officials "shall not engage in any act or practice which has the purpose or effect of unlawfully discriminating against any employee . . . because of such individual's race." The decree also stipulated that it was to be construed and imple-

mented in a manner consistent with the thirteenth and fourteenth amendments and the Civil Rights Act. Thus it appears that although the consent decree did not commit the city to a program of affirmative action involving quotas or numerical goals, it did require faithful adherence to constitutional principles.

For the purpose of detecting an intent to invidiously discriminate, the historical background disclosed by this record is important in two respects. First, it establishes that the city has not historically discriminated against white police officers. Second, it reveals that although the department has long been dominated by white personnel, the city has now undertaken to remove barriers to the promotion of qualified black officers.

The third inquiry identified by Arlington Heights is the degree to which

the action departs from either normal procedureal sequence or normal substantive criteria. Talbert contends that the superiority of his test score establishes his entitlement to promotion under normal circumstances. He emphasizes that the only occasions when promotions had not been made according to the test rank involved scores differing by only a fraction of a point.

We perceive no significant procedural departures. The "rule of five" set out in the city's charter was followed scrupulously. Under this rule the number of persons certified must equal the number of vacancies plus five. The evidence discloses that the test was designed to establish access to the eligibility list. The Director, the Chief, and the consultant who devised the test recognized this

limited function of the test scores.[2] Neither the Chief nor the Director had been instructed about any predictive function of the scores. Furthermore, the uncontradicted evidence establishes that the Director has never considered himself bound to promote according to ranking of test scores, and on other occasions he has made promotions out of order. Thus it is apparent that the test was not de-

---

[2] The consultant testified that "the original task which we were given by the City of Richmond was to develop a procedure which would qualify individuals for an eligible list," and that although the test could be used to differentiate among candidates "to some degree," this was not its major purpose. He indicated his understanding that the assessment center score was not used by the city as the sole basis for making promotions, and he stated that his company would never advise clients to rely strictly on the test instead of also considering their own perceptions and observations as to an employee's ability.

signed to govern the ultimate appointment. Moreover, if the test scores were used to determine promotion as well as certification, the "rule of five" would be thwarted, for the candidates with the five lowest scores would be barred from promotion.

Also, the record discloses no significant departure from the substantive criteria normally employed by the Chief and the Director. Miller's score qualified him for promotion. Previously the city had promoted a white officer to major whose score had been lower than Miller's. Other white officers whose scores were not significantly higher had been appointed to this rank. Although the Chief had never previously recommended for promotion a candidate whose score was more than a point lower than that of a competitor, both officials considered the

differences between Miller's and Talbert's scores and concluded that Miller's promotion was nevertheless warranted.

Miller's assignment as captain was Deputy-Inspector. When the Inspector resigned, Miller was named an acting major, and in this capacity he served as Acting Inspector for more than a year. His ability to discharge the duties of this office was one of the reasons that the Chief recommended his promotion to the rank of major despite the differences in the candidates' scores. In contrast, Talbert had not served as an acting major, and the Chief's letter indicated that his strength lay in getting the job done in the field. That such factors were normally considered by the Chief in making promotions is shown by his entire letter of recommendation, which discussed the experience and performance of each of the

eight candidates.

The final inquiry prescribed in Arlington Heights concerns the adminstrative history of the action and especially the contemporary statements of the officials who made the decisions. The principal statements of this nature are in the Chief's written recommendation of Miller.[3] His letter reveals: (1) the Chief considered both Miller and Talbert to be qualified for promotion; (2) Miller had already been performing as an acting major in his capacity as Inspector and the Chief thought it desirable to make this assingment permanent; (3) the Chief recognized Miller's personnel assessment center score was lower than Talbert's; (4) the Chief did not view this differential as disqualifying Miller from promo-

---

[3] See text at n.1, supra.

tion; and (5) appointing for the first time a qualified black officer to a top level policy-making position would benefit a city whose population was approximately 50% black. The testimony of both the Chief and the Director reaffirmed these contemporary statements.

The evidence discloses that the officals' reason for taking Miller's race into account was their belief that his appointment would be an advantage to the city. As shown by the extract from the district court's opinion quoted in Part I, the court credited this articulation of the officals' motive for promoting, for the first time in the history of the city, a black officer to the rank of major. The reason they expressed was not a pretext to cloak invidious discrimination against Talbert.

Application of the criteria prescribed by Arlington Heights to the facts disclosed by this record establishes that invidious discriminatory purpose was not a motivating factor in the decision to promote Miller. Like the prosecutor in Swain v. Alabama, 380 U.S. 202 (1965), the city officials legitimately took race into account, on an individualized basis, to achieve a legitimate end. Cf. Bakke, 438 U.S. 319 n.53. It was not unlawful for them, as the officials responsible for the operation of the police department, to consider Miller's race in order to have both white and black officers in the department's upper ranks. In Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 695-96 (6th Cir. 1979), Judge Lively addressed this aspect of the operational needs of an urban police department serving a muti-racial population. After can-

vassing studies and expert opinion concerning this subject, Judge Lively thoughtfully concluded:

> The argument that police need more minority officers is not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police. In short, the focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions.

In summary, the attainment of racial diversity in the top ranks of the police department was a legitimate interest of the city. This interest justified the officials' individualized consideration of Miller's race together with all other relevant factors. Their action was not a pretext to cloak invidious discrimination

against Talbert. In the words of Arlington Heights, Talbert has "failed to carry [his] burden of proving that discriminatory purpose was a motivating factor [in the city's act.] This conclusion ends the constitutional inquiry." 429 U.S. at 270-71.

The judgment of the district court is reversed, and the case is remanded for entry of judgment for the appellants.

REVERSED AND REMANDED.

APPENDIX III: ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED ON JUNE 19,1981

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 80-1273

William A. Talbert, Appellee,

versus

City of Richmond, et al, Appellants,

and

Manuel Deese, etc., et al, Defendants.

O R D E R

The appellee's petition for rehearing and suggestion for rehearing en banc has been submitted to the court. A poll of the court was requested, and in the poll a majority of the judges eligible to vote, voted to deny rehearing en banc.

The panel considered the petition for rehearing and is of the opinion that it should be denied.

It is ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

Entered at the direction of Judge Butzner for a panel consisting of Judge Butzner, Judge Field, and Judge Hall. Judge Widener dissents from the denial of rehearing en banc.

For the Court

/s/ William K. Slate, II
CLERK

FILED
June 19, 1981
William K. Slate, II
Clerk


Opposition

Office - Supreme Court, U.S.
FILED
DEC 2 1981
ALEXANDER STEVAS,
CLERK

No. 81-688

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WILLIAM A. TALBERT,

Petitioner,

v.

CITY OF RICHMOND, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI FOR RESPONDENTS, CITY OF RICHMOND, VIRGINIA, AND JACK M. FULTON

James R. Saul
Assistant City Attorney
CITY OF RICHMOND
300 City Hall
Richmond, Virginia 23219
(804) 780-8961

TABLE OF CONTENTS

Page

TABLE OF CITATIONS ii

QUESTION PRESENTED FOR REVIEW 2

STATEMENT OF MATERIAL FACTS 2

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. The Race of Laurel Miller Was Considered to be a Merit Factor 5

II. The Respondents' "Denials" were considered 12

III. The May 1, 1981 Opinion of the Court of Appeals is Consistent with *Fullilove* v. *Klutznick* 12

CONCLUSION 13

CERTIFICATE 14

TABLE OF CITATIONS

Page

Detroit Police Officers Association v. ***Young,***
608 F.2d 671 (6th Cir., 1979) 13

Fullilove v. ***Klutznick,***
448 U.S. 448, (1980) 12

University of California v. ***Bakke,***
438 U.S. 265 (1978) 13

Uzzell v. ***Friday,***
625 F.2d 1117 (4th Cir., 1980) 13

IN THE

Supreme Court of the United States

WILLIAM A. TALBERT,

Petitioner,

v.

CITY OF RICHMOND, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI FOR RESPONDENTS, CITY OF RICHMOND, VIRGINIA, AND JACK M. FULTON

In this Brief respondents City of Richmond and Jack M. Fulton will hereinafter be referred to as "the City" and "Fulton". The petitioner, William A. Talbert, will hereinafter be referred to as "Talbert".

QUESTION PRESENTED FOR REVIEW

Whether it is unconstitutional for the officials responsible for the operation of a police department to give an individualized consideration to the race of a candidate for promotion in order to have both white and black officers in the department's upper ranks?

STATEMENT OF MATERIAL FACTS[1]

The May 1, 1981 opinion of the U. S. Court of Appeals for the Fourth Circuit (Appendix II to Petition for Certiorari) sets forth the material facts in this action. However, it is believed that a more detailed statement of certain facts would be helpful to this Court.

Jack M. Fulton is the Director of Public Safety of the City of Richmond. Under the appropriate provisions of Chapter 11 of the City Charter, he is the appointing authority for promotions within the Bureau of Police, including the promotions to the rank of Police Major on September 2, 1978. (Pre-Trial Order, paragraph C-3; Defendants' Exhibit 2)

Under the City Charter and Personnel Rules, the Personnel Department is responsible for employment testing and the establishment of eligible lists. (Defendants' Exhibit 3)

[1]Under the pre-trial procedures utilized by the district court, the parties stipulated certain material facts and exhibits. The exhibits were set forth in Order in Pre-Trial Conference, Section A, entered on January 14, 1980. The stiuplated facts were set forth in numbered paragraphs in Order in Pre-Trial Conference, Section C. The exhibits will be referred to by their exhibit numbers. The stipulated facts will be referred to as "Pre-Trial Order, paragraph C- ". The transcript of the trial proceedings on January 23, 1980 will be referred to as "Transcript at ".

Under City Charter provisions and Personnel Rules, the Personnel Department certifies to the appointing authority a number of names from the appropriate eligible list equal to the number of vacancies plus five. (Defendants' Exhibit 3; Transcript at 49-52; Pre-Trial Order, paragraph C-7)

It was and is Fulton's understanding that he can promote anyone from among those certified by the Personnel Department for consideration for promotion. He has not felt in any way bound by a person's ranking on the eligible list or the order in which they are shown on the list certified. He has and does understand that under the City Charter and Personnel Rules the position of a person's name on the list certified gives him no priority at all over any other person on the list. He understands that he is free to choose that person or those persons that he feels are most qualified for promotion. The order of promotions in the Bureau of Police and in the other bureaus in his department have frequently been different from the order of the names on the list certified by the Personnel Department. As a matter of fact, Talbert himself was once No. 1 on an eligible list. Seven men below him on that list were promoted, and petitioner Talbert was never promoted from that list. (Pre-Trial Order, paragraphs C-23, 24 and 25; Defendants' Exhibit Nos. 2, 3, 4 and 5; Transcript at 116-122)

As Director of Public Safety, it is the policy of Fulton to promote on the basis of the recommendations of his Bureau Chiefs, including Col. Frank S. Duling, the Chief of Police, unless he finds some overriding reason not to follow their recommendations. There are at least two main reasons for this policy on his part. First, the Bureau Chief is most familiar with the abilities and the qualifications of the candidates for promotion. Second, since these persons will be held responsible for the proper operation and functioning of their bureaus, they should largely determine who fills their supervisory positions. Fulton gives little or no consideration to test scores in filling the supervisory positions in his department, including those in the Police

Bureau. He has more confidence in the discretion and judgment of the heads of the bureaus, including the Chief of Police. (Pre-Trial Order, paragraphs C-3, 4, 15, 16, 17, 18, 19 and 20; Transcript at 52-53, 112-123)

While Fulton had the composite scores from the assessment center procedures for the candidates for promotion to Police Major, he was not inclined to use them. He had only a layman's knowledge of the nature and significance of the assessment procedures. These procedures were administered by persons outside the Police Bureau and outside City employment. In making the selection from among those certified by the personnel Department, Fulton had and has more confidence in the discretion and judgment of Col. Duling than in test results. (Transcript at 52-53, 112-123)

Fulton's reasoning is not inconsistent with the expert opinion of Dr. Robert J. Filer who indicated that there is no perfect test, and that it is quite appropriate for administrators to consider their own subjective evaluations in making promotions. (Transcript at 35-40)

While the District Court found that Fulton and the Chief of Police had given consideration to the race of candidate Laurel Miller as a "plus factor" in promoting him to the position of Police Major over Talbert, there was no finding of any other deviation from past practice and procedure in making the promotion. (See Appendix I to the Petition for Certiorari at pages 31-33 of the Petition for Certiorari.)

SUMMARY OF ARGUMENT

The Court of Appeals having accepted the findings of the Court below that race was a deciding factor in the decision to promote Laurel Miller (rather than Talbert) to the position of Police Major in September, 1978, the City and Fulton believe that the analysis and reasoning set forth in the Court of Appeals' opinion of May 1, 1981, is a fair and accurate statement of the law to be applied to the

findings of the Trial Court. The City and Fulton, therefore, in opposition to Talbert's Petition for Certiorari can do little more than adopt the analysis and statement of the law contained in that Court's May 1, 1981 opinion in this Brief in Opposition to the Petition for Cetiorari.

The City and Fulton submit that the individualized consideration of Laurel Miller's race in promoting him to Police Major which the Trial Court found in this case does not constitute unconstitutional action on their part, particularly in the context of the facts and circumstances of this case.

Contrary to the assertions of Talbert, the City and Fulton did not contend that Laurel Miller's race was not considered. Further, the assertions of the City and Fulton were fully considered by the Trial Court in reaching its findings. Having accepted the findings of the Trial Court, there was no occasion for the Court of Appeals to consider the "denials" made by the City and Fulton in the Trial Court.

ARGUMENT

I. THE RACE OF LAUREL MILLER WAS CONSIDERED TO BE A MERIT FACTOR

In his Petition for Certiorari, Talbert asserts that the City and Fulton have denied that the race of Laurel Miller was considered at the time the September, 1978, promotions to Police Major were made. This statement is repeated a number of times in the course of his Petition. Any such statement is simply untrue and totally misrepresents the City and Fulton's position throughout these proceedings.

There is no question that the race of Laurel Miller was considered at the time of the promotions in question. That is obvious in Col. Duling's memorandum of August 22, 1978, to the Director of Public Safety. (Plaintiff's Exhibit No. 3) Fulton and Col. Duling also testified to that effect in

the course of the trial of this matter. (Transcript at 42-44, 57-60, 71, 79, 81-89) The City and Fulton (and Col. Duling), however, asserted that race was not the deciding factor in the promotion of Laurel Miller to Police Major; rather, it was considered a "plus factor." (Transcript 44-48, 57-59, 70 and 71, 61-85)

The testimony in the Trial Court was that all of the candidates for promotion to fill the three vacant positions of Police Major in September, 1978, were essentially equally qualified for the positions in the opinion of the Chief of Police, Col. Frank s. Duling. (Transcript at 67-70, 77)

In their consideration of Talbert's claim, the City and Fulton requested both the Trial Court and the Court of Appeals to take note of the difficulty, under the best of circumstances, for an appointing authority (or appointing authorities) to articulate his or their subjective reasons for selecting three persons to fill three vacancies out of a group of eight closely qualified candidates. Absent a claim of discrimination, it is inconceivable that an appointing authority (or appointing authorities) would ever be called upon to do so in court. The presumption of regularity in such an exercise of discretion should be enough to sustain the decision of such executive or administrative officials.

Even assuming that Talbert means that the City and Fulton denied that Laurel Miller was promoted "because of his race," the City and Fulton are unable to understand the significance of this repeated assertion in Talbert's Petition for Certiorari, particularly in view of the findings of the Trial Court.

The City and Fulton have taken an alternative stance throughout this proceeding.

In a memorandum in support of their summary judgment motion filed in the Trial Court on January 3, 1980, they argued:

> "Counsel for the defendants do not propose or presume to characterize the testimony of defendant Fulton or Chief of Police Duling or to in

any way limit the scope of the defense of the defendants. Defendants Fulton and Duling will testify at trial as to their actions and decisions. Their testimony does and will speak for itself.

"However, in the way of argument, counsel for the defendants suggest the following points for the Court's consideration:

1. Col. Duling's testimony in his August 5, 1974 deposition in the *Black Police Officers* case indicated that blacks were clearly discriminated against because of their race in the Police Bureau well into the 1950's and possibly into the early 1960's. It is quite probable that the racial attitudes of the rank and file in the Bureau lagged somewhat behind the efforts of the City administration to eliminate racial discrimination in the Bureau. (It might even be argued that the assumption in this lawsuit that Major Miller was promoted solely because of his race contains traces of this same racial prejudice). Whatever impediment any such racial prejudice may have offered for Major Miller who was hired in the Bureau in 1961, it is reasonable to assume that his early career at least, was not made easier by the attitudes prevailing at the time. It therefore would appear to be reasonable to evaluate his achievements in the Bureau against that background.

2. The issue in this case is whether the plaintiff was purposefully and intentionally discriminated against because of his race in September, 1978, when the promotions to Police Major were made. Plaintiff attempts to characterize the issue as being one of whether Major Miller's race was considered at all in his appointment. It may be somewhat difficult to believe that

defendant Fulton and Col. Duling who were sued in 1974 for alleged racial discrimination (allegedly evidenced by the low number of blacks at the upper levels in the Police Bureau), who were subjected to a motion to vacate the consent decree in September, 1977, for alleged continuing discrimination against blacks, and who were facing a trial on a show cause order less than one month subsequent to the September, 1978, promotions, gave no thought to Major Miller's race. The Court, after hearing the evidence, may choose to characterize the thought processes of defendant Fulton and Col. Duling as constituting an effort not to improperly consider Major Miller's race rather than not considering his race at all. However, even if their thought processes are evaluated in that light, it would still not constitute purposeful and intentional discrimination against the plaintiff because he is white.

3. It is obvious that the mental processes involved in selecting persons for appointment and promotion under the simplest of conditions are both subtle and complex and involve both conscious and unconscious processes. In the last six or seven years, defendant Fulton and Col. Duling have had to make such decisions in an atmosphere of suspicion and challenge. While it is obviously difficult for third parties to evaluate the thought processes of defendant Fulton and Col. Duling in making personnel selection decisions, it must also be difficult for defendant Fulton and Col. Duling to articulate the operation of their reasoning processes in making such decisions. Appointing authorities, fortunately, are not often required to justify their personnel selection decisions in that manner. For this reason, the Court should be very cautious in finding (and it is

submitted should not find) that they have been guilty of purposeful and intentional discrimination against the plaintiff.

4. In their testimony in other cases, both defendant Fulton and Col. Duling have testified as to the need for more blacks in the Police Bureau at all levels. This need grows out of the special function of the Police Bureau, the need for public respect and acceptance, and the demographic makeup of the City population. If that is true, a black candidate for promotion in the Bureau has a special benefit to offer the City and the Bureau just by virtue of his race. Any objective reading of the opinions of the Supreme Court, particularly the opinion of Justice Powell, in *Regents of The University of California* v. *Bakke*, 438 U.S. 265, 98 S. Ct. 2733, 57 L.Ed. 2d 750 (1978), would indicate that it would clearly not be improper to consider that plus factor along with all other qualifications in considering candidates for promotion in the Police Bureau. Further, as indicated above, any such consideration of that plus factor would not be a violation of the consent decree. Nor would it be a violation of any policy set forth in the City's equal employment opportunity plan or any other personnel policy of the City, including a policy of promoting on the basis of merit. See also *Detroit Police Officers Association* v. *Young*, F.2d 21 EPD ¶ 30,313 (6th Cir., October 12, 1979)."[2] (See pages 14-17 of the defendants' memorandum in support of their motion for summary judgment filed on January 3, 1980).

[2]See Defendants' Proposed Findings of Fact and Conclusions of Law filed in the Trial Court on January 18, 1980.

A similar position was taken in the City's and Fulton's proposed findings of fact and conclusions of law filed in this case in the Trial court on January 18, 1980.[2] These defendants adopted by reference the conclusions of law contained in the argument in their memorandum in support of their motion for summary judgment. (See defendants' response to plaintiff's proposed finding of fact No. 43 and also proposed conclusion of law in the Proposed Findings of Fact and Conclusions of Law filed by the defendants in the Trial Court on January 18, 1980).

The Trial Court adopted the Proposed Findings of Fact and conclusions of law filed by the parties (and presumably the other memoranda) as part of their opening statements and as setting forth the general positions of the parties both regarding the facts and the law. (Transcript at 4 and 15)

It is clear that the Trial Court considered this alternative position taken by the City and Fulton both in making its findings of fact and in applying its view of the law to those facts. (See Appendix I to the Petition for Certiorari at pages 35-37 and 49-50 of the Petition for Certiorari).

However, for the purposes of considering Talbert's Petition for Certiorari, the most significant findings of the Trial Court are found contained in the following comments of Judge Warriner:

> "Now, his reasons for doing that are in most respects laudatory. His reason for doing it is because he thought it was best for the police force; he thought it was best for the City; he thought that it would help the City in its relations with the people that the police force is required to maintain order among, and to enforce the law. He thought it would be good for the spirit and morale of the citizens. I'm certain all of those things entered into Col. Duling's and Mr. Fulton's determination to make this promotion on the basis

of race.

> "The philosophy of making determinations in hiring, and promotion, and discipline on the basis of race is a philosophy which held sway in this area of the country for quite a long time. But effective with the Supreme Court decisions in modern times this philosophy was determined to be wrong, and the law has been clear in the United States for at least 15 years that determinations in employment situations which result in discrimination because of race are illegal. Whether or not they're good or bad, they're illegal. Whether or not one is motivated by benign or malign purposes, they're illegal.
>
> "Now, I suggest that all of the good things that Col. Duling and Mr. Fulton foresee in promoting on the basis of race may not come to fruition, and they may be reaping a harvest which will be detrimental to all of the things that they think they are promoting; resentment among persons, particularly black persons, who resent the implication that they can't be promoted on merit, but have to be promoted on race . . . ." (See Appendix I to the Petition for Certiorari at pages 31-33 of the Petition for Certiorari).

It is clear that Judge Warriner found that Col. Duling's and Fulton's consideration of Laurel Miller's race was an "individualized consideration" and that they had concluded that his race was a "merit" factor.

It is respectfully submitted that Judge Warriner merely drew erroneous conclusions as to the law to be applied to those facts. Certainly, that was the holding of the Court of Appeals in its May 1, 1981 opinion.

It is also respectfully submitted that the Court of Appeals in its May 1, 1981 opinion not only accurately stated what

the law is, but what it ought to be. One must simply refuse to face reality if one refuses to consider the race of Laurel Miller (in the context of the facts and circumstances of this case) a "merit" factor insofar as his promotion to Police Major was concerned.

If his race was a proper "merit" factor under those circumstances, its consideration was neither a violation of federal constitutional or statutory law nor a violation of city personnel policies and procedures. (See Consent Decree that was an Exhibit to the Complaint; See also Plaintiff's Exhibit No. 1; and Defendants' Exhibit No. 1 and 4).

II. THE RESPONDENTS' "DENIALS" WERE CONSIDERED

Talbert contends that the holding of the Court of Appeals in its May 1, 1981 opinion is erroneous because it failed to consider the Respondents' "denials" relating to the consideration of Laurel Miller's race. However, since the Court of Appeals accepted the findings of fact of the Trial Court, Talbert has not suggested why these "denials" should be significant in further analysis by the Court of Appeals. Such "denials", perhaps, have some relevance in reaching findings of fact, but not in the application of the law to those facts. It is clear that the Trial Court took note of any "denials" made by the defendants in making its findings of fact.

III. THE MAY 1, 1981 OPINION OF THE COURT OF APPEALS IS CONSISTENT WITH *FULLILOVE* v. *KLUTZNICK*

The May 1, 1981 opinion of the Court of Appeals is not inconsistent with Fullilove v. *Klutznick,* 448 U.S. 448,

(1980). In that case the Supreme Court upheld a minority enterprise provision of a federal construction grant program to state and local governments which involved a limited racial and ethnic preference.

It should be noted that the comments of Justice Powell in his dissenting opinion in that case were not directed toward an "individualized consideration" of race such as was found in this case with reference to Laurel Miller or as he suggested would be appropriate in *University of California* v. *Bakke,* 438 U.S. 265 (1978). In *Fullilove,* Justice Powell was directing his comments toward "racial classification" such as that found in the minority enterprise provision.

In *Uzzell* v. *Friday,* 625 F.2d 1117 (4th Cir., 1980), the Court of Appeals had to consider the constitutionality of regulations approved and effectuated by the University of North Carolina which required that a certain number of the members of the legislative branch and the judicial branch of the student government be members of a minority race. The Fourth Circuit in that case, also, was concerned with "racial classification" not with the "individualized consideration of race" found in this case.

It is submitted tha the appropriate analysis to be applied in this case is that suggested in *Detroit Police Officers Association* v. *Young,* 608 F.2d 671 (6th Cir., 1979) and in the court of Appeals opinion of May 1, 1981.

CONCLUSION

It is respectfully submitted that the May 1, 1981 opinion of the Court of Appeals' was clearly correct in its analysis of the law to be applied to the Trial Court's findings of fact.

The City and Fulton therefore respectfully request that Talbert's Petition for Certiorari be denied.

Respectfully submitted,

CITY OF RICHMOND and
JACK M. FULTON,

By:
Of Counsel

James R. Saul
Office Of The City Attorney
300 City Hall
Richmond, Virginia 23219

CERTIFICATE

I hereby certify that I have this 1st day of December 1981, hand-delivered three true copies of this Brief in Opposition to the Petition for Writ of Certiorari to Michael S. Shelton, Esquire, Cohen, Ableoff & Staples, P.C., 207 West Franklin Street, Richmond, Virginia 23220.

JAMES R. SAUL
Assistant City Attorney